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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 POE VILI NIELSEN,

11 Plaintiff,

12 v.

13 CAROLYN W. COLVIN, Acting  
14 Commissioner of the Social Security  
Administration,

15 Defendant.  
16

CASE NO. 14-cv-05466 JRC

ORDER ON PLAINTIFF'S  
COMPLAINT

17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and  
18 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.  
19 Magistrate Judge and Consent Form, Dkt. No. 3 Consent to Proceed Before a United  
20 States Magistrate Judge, Dkt. No. 4). This matter has been fully briefed (*see* Dkt. Nos.  
21 11, 14, 15).

22 After considering and reviewing the record, the Court finds that the ALJ erred in  
23 adversely assessing plaintiff's credibility. In finding plaintiff to be not credible, the ALJ  
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1 pointed to an investigation of plaintiff regarding his alleged need to use a wheelchair or  
2 crutches to get around. However, that investigation occurred after the time period in  
3 which plaintiff was claiming he needed a wheelchair or crutches. The ALJ also pointed  
4 to plaintiff's IRS problems, which the ALJ categorized as tax fraud. However, these two  
5 reasons were not supported by substantial evidence in the record.

#### 6 BACKGROUND

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8 Plaintiff, POE VILI NIELSEN, was born in 1967 and was 44 years old on the  
9 amended alleged date of disability onset of May 10, 2012 (*see* AR 12, 170-76, 177-83).  
10 Plaintiff has a high school education and completed a truck driving school (AR 33).  
11 Plaintiff has work experience driving a fork lift (AR 37). He then owned a bakery that  
12 catered to Samoan people until "he couldn't find the energy to do it anymore. That's  
13 why he stopped." (AR 34.)

14 According to the ALJ, plaintiff has at least the severe impairments of "ischemic  
15 heart disease; diabetes mellitus; osteoarthritis; and gout (20 CFR 404.1520(c) and  
16 416.920(c))" (AR 15).

17 At the time of the hearing, plaintiff was living with his wife, and taking care of a  
18 niece and nephew.

#### 19 PROCEDURAL HISTORY

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21 Plaintiff filed an application for disability insurance ("DIB") benefits pursuant to  
22 42 U.S.C. § 423 (Title II) and Supplemental Security Income ("SSI") benefits pursuant to  
23 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act, which were denied initially  
24 and following reconsideration (*see* AR 46-53, 54-64, 67-80, 81-94). Plaintiff's requested

1 hearing was held before Administrative Law Judge Gary Elliott (“the ALJ”) on January  
2 8, 2014 (*see* AR 26-43). On January 31, 2014, the ALJ issued a written decision in which  
3 the ALJ dismissed plaintiff’s Title II claim (AR 13) and concluded that plaintiff was not  
4 disabled pursuant to the Social Security Act (*see* AR 9-25).

5 In plaintiff’s Opening Brief, plaintiff raises the following issues: (1) Did the ALJ  
6 err in adversely assessing plaintiff’s credibility; and (2) Were the ALJ’s errors harmless  
7 (*see* Dkt. No. 11, p. 1).

#### 8 STANDARD OF REVIEW

9 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's  
10 denial of social security benefits if the ALJ's findings are based on legal error or not  
11 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d  
12 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.  
13 1999)).  
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#### 15 DISCUSSION

##### 16 **1. Did the ALJ err in adversely assessing plaintiff’s credibility?**

17 Plaintiff asserts that the ALJ erred in making an adverse credibility determination.  
18 In his decision, the ALJ noted that there were multiple aspects of the record that he  
19 believed reflected negatively on the credibility of the claimant, specifically noting that a  
20 Cooperative Disability Investigations Unit (“CDIU”) report contradicted plaintiff’s  
21 allegations that he could not walk and was confined to a wheelchair, and that plaintiff had  
22 two or more past businesses that were the subject of IRS fraud investigations (*see* AR  
23 18).  
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1 The ALJ's credibility determinations "must be supported by specific, cogent  
 2 reasons." *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (citing *Bunnell v.*  
 3 *Sullivan*, 947 F.2d 341, 343, 346-47 (9th Cir. 1991) (*en banc*)). In evaluating a claimant's  
 4 credibility, the ALJ cannot rely on general findings, but "'must specifically identify what  
 5 testimony is credible and what evidence undermines the claimant's complaints.'" *Greger*  
 6 *v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (quoting *Morgan v. Comm'r of Soc. Sec.*  
 7 *Admin.*, 169 F.3d 595, 599 (9th Cir. 1999)); *Reddick, supra*, 157 F.3d at 722 (citations  
 8 omitted); *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (citation omitted). If an  
 9 ALJ rejects the testimony of a claimant, the ALJ must support the rejection "by offering  
 10 specific, clear and convincing reasons for doing so." *Smolen, supra*, at 1284 (citing  
 11 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.1993)); *see also Reddick, supra*, 157 F.3d at  
 12 722 (citing *Bunnell v. Sullivan, supra*, 947 F.2d at 343, 346-47). The Court notes that  
 13 this "clear and convincing" standard recently was reaffirmed by the Ninth Circuit. *See*  
 14 *Garrison v. Colvin*, 759 F.3d 995, 1015 n.18 (9th Cir. July 14, 2014) ("The government's  
 15 suggestion that we should apply a lesser standard than 'clear and convincing' lacks any  
 16 support in precedent and must be rejected"). As with all of the findings by the ALJ, the  
 17 specific, clear and convincing reasons also must be supported by substantial evidence in  
 18 the record as a whole. 42 U.S.C. § 405(g); *see also Bayliss v. Barnhart*, 427 F.3d 1211,  
 19 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

#### 22 A. Plaintiff's Use of a Wheelchair and CDIU Report

23 First, the ALJ pointed to a CDIU report that he believed contradicted plaintiff's  
 24 allegations that he could not walk and was confined to a wheelchair. The ALJ found that

1 this evidence reflected negatively on plaintiff's statements. Plaintiff pointed out at the  
2 administrative hearing and in his briefing that he could not walk and needed a wheelchair  
3 or crutches from June 4, 2012, the date of his initial function report, through November  
4 of 2012, and that there is evidence in the medical records to that effect (*see* Dkt. No. 11,  
5 pp. 3-4; AR 30-32). However, plaintiff points out that plaintiff did not claim that he  
6 needed crutches or a wheelchair after that date and there is no evidence in the medical  
7 record where he makes such a claim after November 2012.

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9 The CDIU investigation took place from February to March of 2013 (*see* AR 185-  
10 193). The CDIU report included several observations by the investigator that during that  
11 period, although plaintiff had a tender walk/slight limp, he walked unassisted (*see* AR  
12 186, 192). It also included statements by a witness who said that she had previously seen  
13 plaintiff use a walker, cane and wheelchair, but not recently (*see* AR 191). Since plaintiff  
14 is not claiming to have needed a wheelchair after November of 2012, there is no  
15 inconsistency with the CDIU investigation that took place in early 2013. The ALJ's  
16 reference to the CDIU report as evidence of misrepresentations is unsupported by  
17 substantial evidence.

#### 18 B. IRS Fraud Investigations

19 The ALJ notes in his decision that "the record reflects that two or more of the  
20 claimant's past businesses were the subject of IRS fraud investigations, and were  
21 ultimately shut down due to tax disputes" (*see* AR 18). Although the ALJ did not cite to  
22 any exhibit for this evidence, defendant points out that plaintiff told the CDIU  
23 investigator during his interview that "the IRS shut him down," referring to a business he  
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1 had (*see* AR 192) and that he “still had some old business accounts the IRS seized,  
2 because of tax problems,” at which time he had filed for bankruptcy (*see* AR 193).  
3 Neither reference is to an “IRS fraud investigation.” However, defendant contends that  
4 these references imply “at the very least, Plaintiff’s engagement in improper behavior by  
5 refusal to pay his tax obligation, which is a rational interpretation of the record and,  
6 therefore, proper basis for questioning the credibility of his allegations” (*see* Dkt. No. 14,  
7 p. 6). The ALJ may “draw inferences logically flowing from the evidence.” *Sample*,  
8 *supra*, 694 F.2d at 642 (*citing Beane v. Richardson*, 457 F.2d 758 (9th Cir. 1972); *Wade*  
9 *v. Harris*, 509 F. Supp. 19, 20 (N.D. Cal. 1980)). However, an ALJ may not speculate.  
10 *See* SSR 86-8, 1986 SSR LEXIS 15 at \*22. It is speculation on the part of the ALJ that  
11 the seizure of plaintiff’s business accounts by the IRS is “fraud” or a “refusal” to pay a  
12 tax obligation. Because the ALJ did not offer supporting evidence for his conclusion that  
13 plaintiff was the subject of an “IRS fraud investigation,” the ALJ’s reference to plaintiff’s  
14 IRS troubles as evidence of a “history of misrepresentations” that reflect negatively on  
15 the claimant’s statements is unsupported by substantial evidence and, therefore, is in  
16 error.  
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## 18 **2. Were the ALJ’s errors harmless?**

19 Defendant argues that any error in the ALJ’s assessment of plaintiff’s credibility is  
20 harmless. The Ninth Circuit has “recognized that harmless error principles apply in the  
21 Social Security Act context.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)  
22 (*citing Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th  
23 Cir. 2006) (collecting cases)). The court noted that “several of our cases have held that  
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1 an ALJ's error was harmless where the ALJ provided one or more invalid reasons for  
2 disbelieving a claimant's testimony, but also provided valid reasons that were supported  
3 by the record." *Id.* (citations omitted). The court also noted that the Ninth Circuit has  
4 "adhered to the general principle that an ALJ's error is harmless where it is  
5 'inconsequential to the ultimate nondisability determination.'" *Id.* (quoting *Carmickle v.*  
6 *Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008)) (other citations omitted).

7  
8 The ALJ only identified two reasons for discounting plaintiff's credibility – the  
9 CDIU report and an "IRS fraud investigation." As discussed above, these two reasons  
10 were not supported by substantial evidence in the record. Had the ALJ given more  
11 weight to plaintiff's testimony regarding his subjective symptoms, the ALJ would have  
12 come to a different conclusion regarding plaintiff's RFC, since subjective symptoms must  
13 be included in the RFC assessment unless they are found to be not credible. Therefore,  
14 the error is not harmless.

### 15 **3. Defendant's discussion of other credibility factors.**

16 Defendant argues that there were other "clear and convincing credibility factors  
17 supporting [the ALJ's] adverse determination." (*see* Dkt. No. 14, p. 3). Defendant offers  
18 evidence in the record, but not noted by the ALJ, as reasons for discounting plaintiff's  
19 credibility (*see* Dkt. No. 14, pp. 3-5, 7, 10). According to the Ninth Circuit, "[l]ong-  
20 standing principles of administrative law require us to review the ALJ's decision based  
21 on the reasoning and actual findings offered by the ALJ - - not *post hoc* rationalizations  
22 that attempt to intuit what the adjudicator may have been thinking." *Bray v. Comm'r of*  
23 *SSA*, 554 F.3d 1219, 1225-26 (9th Cir. 2009) (*citing* *SEC v. Chenery Corp.*, 332 U.S.  
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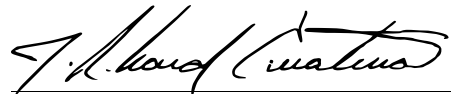
1 194, 196 (1947) (other citation omitted)); *see also Molina v. Astrue*, 674 F.3d 1104, 1121  
2 (9th Cir. 2012) (“we may not uphold an agency’s decision on a ground not actually relied  
3 on by the agency”) (*citing Chenery Corp, supra*, 332 U.S. at 196). Therefore, this Court  
4 will not evaluate reasons that were not proffered by the ALJ as justification for  
5 discounting plaintiff’s credibility.

6 CONCLUSION

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8 Based on these reasons and the relevant record, the Court **ORDERS** that this  
9 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §  
10 405(g) to the Acting Commissioner for further consideration consistent with this Order.

11 **JUDGMENT** should be for plaintiff and the case should be closed.

12 Dated this 5th day of December, 2014.

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15 J. Richard Creatura  
16 United States Magistrate Judge  
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